



Office of Management and Budget

October 2, 2001

Mr. Tracy Mehan
Assistant Administrator for Water
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 4101
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Mehan:

On June 29, 2001, the Environmental Protection Agency (EPA) Office of Water submitted a draft proposed rule titled "Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards" to the Office of Management and Budget (OMB) for review under Executive Order No. 12866. This proposed rule would establish Federal water quality standards for all Tribal waters except those already covered by EPA-approved Tribal standards, and those for which a Tribe requests deferred application of the Federal standards on the grounds that the Tribe will develop its own standards "within a reasonable period of time."

Water quality standards are one of the fundamental tools provided by the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Act provides for States and Tribes to adopt such standards, generally on a waterbody, watershed, or ecoregion specific basis, and for EPA to review and approve (or disapprove) these standards. The Office of Information and Regulatory Affairs (OIRA) recognizes the fundamental role played by water quality standards under the Act, and supports EPA's on-going efforts to speed the pace of Tribal adoption of such standards. However, we have several concerns with the draft proposed rule that has been submitted for our review and believe it could be improved by further analysis and consultation with stakeholders, particularly States and Tribes.

The rule would establish a protective use designation and numeric criteria for over 100 specific pollutants, which would apply to "as much land area as all of New England plus the State of New Jersey" (Draft Preamble, p 13). No quantitative analysis of the costs and benefits that would result from this action is provided. We understand that EPA believes the cost impacts of the rule would be minimal, but are concerned with the limited analytical basis provided for this conclusion. We note that the preamble identifies nearly 300 point sources on Tribal lands that would be directly affected by the rule. In addition, there may be substantial numbers of non-point sources, and point sources upstream of Tribal lands, that could also be affected. There may also be significant costs associated with developing and implementing Total Maximum Daily Loads that could be required as a result of the rule. We believe

the rule would benefit from further analysis of these costs, in order to support informed public comment, before it is published as a formal proposal. It would also be helpful to see additional analysis of the benefits of the rule, including quantitative analysis where possible.

We are further concerned with the Agency's conclusion that the proposed rule does not have Federalism implications. We note that the rule would create pockets within virtually every State to which the new Federal water quality standards would apply. This will impose on each State an obligation to ensure that all permits for upstream dischargers are protective of these standards. However, the rule does not appear to contain any requirement for consultation with States prior to a determination by the Regional Administrator (RA) regarding exactly which uses and numeric criteria will apply to specific Tribal waters. While the preamble does indicate that EPA intends to consult with adjacent States "as appropriate," this appears to be limited to situations where it is necessary to identify which standards are applicable to waterbodies of these States. There is no discussion of consultation regarding the impacts of the RA's determinations on State permitting activities in upstream waters. OIRA believes these impacts are likely to be significant, at least in some cases, and that States are likely to be concerned about them. We are also concerned that the rule appears to establish for the first time EPA jurisdiction over waters whose Indian country status is in dispute. We expect that States may also have concerns over this provision. We do recognize that EPA has provided several opportunities for State input during the development of the draft rule, but believe that the rule could be improved by additional consultation with States. Such consultation will also make it more likely that the rule will be favorably received by States when published as a formal proposal.

As a result of the concerns stated above, I am returning the draft proposed rule on Federal Water Quality Standards for Indian Country to the Agency for further consideration and analysis. This effort should include additional consultation with States and Tribes, and further analysis of costs and benefits. One option that the Agency may wish to consider would be to publish an Advanced Notice of Proposed Rulemaking to solicit comment from a range of stakeholders on the concepts embodied in the draft proposal, as well as on alternate approaches for promoting coverage of Tribal lands by appropriate water quality standards. My staff is available for further discussion with you regarding the concerns that have been raised, and stands ready to work with you to improve the analysis of this important rule making.

Sincerely,

/s/

John D. Graham, Ph.D.
Administrator